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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

JUL 15 1996
FEDERAL
COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Revision of Part 22 and Part 90) WT Docket No. 96-18
of the Commission's Rules to)
Facilitate Future Development)
of Paging Systems)
)
Implementation of Section 309) PP Docket No. 93-253
of the Communications Act)
-- Competitive Bidding)

To: The Commission

**COMMENTS OF ARCH COMMUNICATIONS GROUP, INC.
ON PETITIONS FOR RECONSIDERATION**

Arch Communications Group, Inc. ("Arch"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby submits its Comments on the Petitions for Reconsideration ("Petitions")^{1/} filed with reference to the Commission's First Report and Order^{2/} adopted in the captioned proceeding. The following is respectfully shown:

I. BACKGROUND

1. Arch provides wireless messaging services, primarily paging, to over 2.7 million units in 38 states, making it the third largest paging carrier in the United

^{1/} Petitions were filed by TSR Paging, Inc., Metrocall, Inc., Pagemart II, Inc., Ameritech Mobile Services, Inc., Radiofone, Inc., Paging Coalition and the Paging Licensees, Diamond Page Partnerships, America One Partnership, et. al, Motorola, Inc., Paging Network, Inc., the Personal Communications Industry Association, and ProNet, Inc.

^{2/} Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, First Report and Order, FCC 96-183, WT Docket No. 96-18, released April 23, 1996.

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States. Arch's operations include local, regional and nationwide common carrier and private paging systems. Arch has participated extensively in this proceeding to date. Arch filed comments and reply comments in response to the Notice of Proposed Rule Making ("NPRM")^{3/} with respect to both the Commission's interim licensing proposal and the market area licensing proposal. Thus, Arch has a substantial basis in experience to comment on the latest filed petitions in this proceeding.

2. Arch consistently has urged the Commission to adopt rules governing the market area licensing process as expeditiously as possible. Arch continues to support prompt completion of this proceeding. Notwithstanding the Commission's continuing efforts to adopt final rules promptly, unexpected delays could lengthen the transition period pending the market area licensing event. To the extent that such delays occur, or to the extent that the Commission determines that the proposals set forth in the Petitions could be adopted on an interim basis during the transition, Arch respectfully submits its comments with respect to the petitions filed.

3. Arch recognizes and appreciates the Commission's good faith efforts to mitigate the possible adverse affects of the transition from site-by-site to market area licensing by

^{3/} Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Notice of Proposed Rule Making, FCC 96-52, WT Docket No. 96-18, released February 9, 1996.

the Commission's partial lifting of the freeze, both in the First Report and Order and the Order on Reconsideration of First Report and Order ("Recon Order").^{4/} Arch also believes that certain of the positions advocated in the Petitions filed warrant further exploration and support by the Commission.

II. APPLICATIONS FILED PRIOR TO THE FREEZE SHOULD BE PROCESSED

4. Pursuant to the First Report and Order, incumbents may propose facilities during the freeze which are located within 65 kilometers (40 miles) of authorized facilities which were licensed to the incumbent as of February 8, 1996, and are operating as of the date on which the application is filed with the FCC. Several petitioners requested that the Commission further relax the freeze and permit incumbents to rely upon authorized and constructed facilities which were the subject of applications filed with the Commission prior to February 8, 1996, the date on which the freeze commenced.^{5/} These petitioners emphasized the lengthy delay in the processing of 931 MHz applications which incumbents experienced as well as the ever-growing demand and changing system needs experienced by paging carriers.

^{4/} Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Order on Reconsideration of First Report and Order, FCC 96-260, WT Docket No. 96-18, released June 11, 1996.

^{5/} See Ameritech, p. 2, Paging Coalition, p. 2, ProNet, p. 3, PCIA, pp. 7-9, and Metrocall, pp. 5-7.

5. Since the subject petitions were filed, the Commission has further relaxed the freeze, permitting incumbents to rely upon authorized facilities in the 931 MHz band which were the subject of applications filed on or before September 30, 1995. The further relaxation of the freeze helps certain paging companies meet the demand which prompted them to file these 931 MHz band applications last year. Nevertheless, the Recon Order does not address two critical concerns. First, limiting relief to applications filed with the Commission prior to September 30, 1995 is somewhat arbitrary and does not fully recognize the significant growth in subscriber demand experienced between September and the present. Cutting off carriers' ability to respond to consumer demand for nine months (thus far) inevitably damages their ability to provide the type and quality of service requested by subscribers.

6. Second, the Recon Order does not provide relief to paging companies operating on frequency bands below 931 MHz. Subscriber growth and demand, and changing requirements of system configuration and development, are not unique to the 931 MHz band. Permitting incumbents on lower bands to rely only upon facilities licensed as of February 8, 1996 places these operators at a competitive disadvantage. Such disparate treatment between competing CMRS providers does not fulfill the Commission's goal of achieving regulatory parity among substantially similar services.

7. Arch respectfully suggests that permitting incumbents to rely upon facilities for which applications were pending with the FCC as of February 8, 1996 will not increase or condone speculation as long as construction of the authorized facility is a prerequisite to using the site as the basis of a 40-mile expansion.^{6/} Applications filed prior to the commencement of the freeze reflect routine system modification and development. All the petitioners have requested is the ability to rely upon any and all such pre-freeze applications on an equal footing.

III. ELIGIBILITY TO FILE COMPETING APPLICATIONS SHOULD BE LIMITED TO INCUMBENTS

8. Several petitioners requested that eligibility to file mutually exclusive applications be limited to incumbents.^{7/} Arch shares the petitioners' belief that the Commission can decrease the potential for speculation by limiting the eligibility to file competing applications to co-channel incumbents.^{8/} By limiting eligibility in this way, the Commission can ensure that the purpose of competing

^{6/} Arch and the petitioners are not requesting that the Commission process applications filed after February 8, 1996 (in instances other than those the Commission already has permitted by its First Report and Order and Recon Order).

^{7/} See Ameritech, pp. 3-4, Paging Coalition, p. 5, ProNet, p. 5, and PageNet, pp. 3-4.

^{8/} Arch respectfully suggests that the Commission has the authority to define minimum eligibility criteria where such criteria serve the public interest. See Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

applications filed is the expansion of existing service areas by bona fide providers of paging services.

9. Arch also supports the petitions which request that the Commission give applicants the option of resolving competing applications by mutually acceptable engineering solutions.^{9/} If the Commission limits the eligibility to file competing applications to co-channel incumbents, mutually agreeable resolution of competing applications would permit service to be provided to the public more expeditiously and without risk of speculation. First, since the competing applicants each provide service to the public, a resolution which permits both to implement new or modified facilities in response to customer demand, rather than wait until the completion of the market area licensing event, facilitates the prompt provision higher quality service to subscribers. Second, since non-incumbents, e.g., application mills, would be prohibited from filing competing applications, they would be unable to use competing applications as leverage in settlement discussions and prevent service to subscribers. Initially, and most important, the Omnibus Budget Reconciliation Act of 1993 which gave the Commission its auction authority explicitly instructed the Commission to continue to consider and permit engineering solutions to mutual exclusivities.^{10/}

^{9/} See PageNet, p. 4, and ProNet, pp. 8-9.

^{10/} 47 U.S.C. §309(j)(6)(E)

IV. DEFINITION OF PERMISSIVE MODIFICATIONS SHOULD BE MODIFIED

10. As noted above, the Commission has expended considerable effort in achieving workable interim rules for paging companies during the transition to market area licensing. The Commission has been sensitive to paging carriers' needs to make minor system changes in fringe areas in response to consumer demand. In response to the paging industry's expressed need, the Commission has permitted incumbents to modify systems within their existing interference contours. This represented to the Commission a balance between incumbents' need to respond to customer demand and the interest in preserving white space for the impending transition to market area licensing. Arch respectfully suggests that the Commission can permit incumbents to make one additional type of permissive modification to respond to consumer demand without upsetting that balance.

11. Arch suggests that the Commission define as permissive a modification which is intended to fill a gap or crease in an existing system and for which no other applicant could apply absent the consent of the incumbent.^{11/} By definition, any such modification would be filed solely for the purpose of providing service to the public, rather than speculation in spectrum. In addition, by prohibiting such modifications, the Commission is effectively denying service

^{11/} See ProNet, pp. 10-11

to those crease or gap areas. As proposed, incumbents would only be permitted to make modifications in areas for which no other applicant could apply, given the incumbent's right to protection from harmful interference. Consequently, if the incumbents cannot serve the area, and the geographic licensee also cannot serve the area (assuming the incumbent licensee does not become the geographic licensee), service simply will not be introduced unless the incumbent and geographic licensee reach an agreement with respect to this area. Any such agreement, if reached, is likely to be years down the road, since a geographic licensee's first order of business will be to expand its own system rather than worry about that of an incumbent.

V. ITEMS IN NEED OF CLARIFICATION

12. The petitioners accurately pointed out that clarification of certain matters relating to the application freeze, and subsequent relaxation of the freeze, would prove very helpful to the industry in proceeding during the transition to market area licensing. First, the Commission should clarify that assignees or transferees of paging authorizations also should be permitted to rely upon all facilities, including applications filed with respect thereto, acquired pursuant to the FCC's approval of an assignment of license or transfer of control application.^{12/} Since the FCC approves the acquisition by the assignee or transferee of all

^{12/} See Metrocall, p. 5.

facilities subject to the underlying assignment or transfer application, the assignee/transferee must be permitted to proceed on the basis of, and enjoy the benefits of, full ownership of those facilities.

13. Arch also agrees that the Commission should clarify what information licensees are required to maintain in their station files as well as what documentation licensees should file with the FCC with respect to permissive system modifications and in order to ensure protection from harmful interference by subsequently placed facilities.^{13/} Arch notes that, in an abundance of caution, several carriers are filing FCC Forms 489 to notify the Commission of permissive modifications to systems even though such filings are not required by the NPRM. Thus, further clarification of carriers' filing and record maintenance obligations would be much appreciated.

14. Finally, the Commission should clarify that it will process applications to relocate facilities authorized pursuant to a major modification application where the construction permittee has not yet constructed the authorized facility,^{14/} provided that the relocated facility is located within 10 miles of the initially authorized, but unconstructed, facility. By limiting relocation applications

^{13/} See Metrocall, pp. 8-10

^{14/} See ProNet, pp. 11-12

in this manner, the Commission will ensure that the sole purpose of the proposal is to relocate a facility due to unforeseen and unavoidable circumstances.

15. In this regard, Arch notes that permittees are occasionally faced with the necessity to relocate a proposed facility due to circumstances beyond their control. Such relocation can be critical during the current freeze where expansion of interference contours is permitted only in limited circumstances, and can prevent a permittee from implementing an authorized facility, or introducing as high a quality service from an authorized facility.

WHEREFORE, the foregoing comments being duly considered, Arch respectfully requests that the Commission reconsider the First Report and Order consistent with these Comments.

Respectfully submitted,

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July 15, 1996

Certificate of Service

I, Yvette Omar, a secretary with the law firm of Paul, Hastings, Janofsky & Walker, hereby certify that a copy of the foregoing **Comments of Arch Communications Group, Inc. on Petitions for Reconsideration**, was sent via first class U.S. mail, postage prepaid, or hand-delivered on this 15th day of July 1996, to the following:

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